(1)

Supreme Court, U.S.
FILED

No. 991403 FEB 22 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA AND BOARD OF TRUSTEES OF CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA,
Petitioners,

vs.

RAYMOND STONE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES P. WATSON
Counsel of Record

STANTON, KAY & WATSON, LLP

101 New Montgomery Street, Fifth Floor
San Francisco, California 94105
(415) 512-3501

Attorneys for Petitioners
CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, et al.

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

62pp

QUESTIONS PRESENTED FOR REVIEW

1. May the fiduciaries of an ERISA-regulated health plan bring an action against a plan participant under Section 502(a)(3) of ERISA, 29 U.S.C. Section 1132(a)(3), to compel the participant to reimburse medical expenses advanced by the plan, as required by the plan's governing instrument and by a written reimbursement agreement between the plan and the participant?

2. Does Section 502(a)(3) of ERISA, 29 U.S.C. Section 1132(a)(3), which permits fiduciaries to seek only "appropriate equitable relief," bar a claim by fiduciaries of an ERISA-regulated plan for restitution or reimbursement of medical costs advanced to a plan participant?

3. Does the limitation of Section 502(a)(3) of ERISA to recovery of only "appropriate equitable relief" preclude claims seeking specific performance, injunctive relief, restitution or other traditional equitable remedies, merely because the grant of such equitable relief will result in a monetary recovery by an ERISA-regulated trust?

4. Does an equitable action for restitution lie only when the sums sought to be recovered are "ill-gotten gains" obtained through fraudulent or dishonest means?

LIST OF PARTIES TO THE PROCEEDING

Petitioners are Cement Masons Health and Welfare Trust Fund For Northern California and Board Of Trustees Of Cement Masons Health And Welfare Trust Fund For Northern California. The individual trustees are Ohnie Oakley, Edward T. Bergo, Thomas R. Estrada, George R. Wilson, Derrel Hardy, Karl Bik, Steven Scott and Catherine Escobar.

Respondent is Raymond Stone, an individual.

TABLE OF CONTENTS

		Page
I.	OPINIONS BELOW	1
II.	JURISDICTION	1
III.	STATUTORY PROVISIONS INVOLVED	2
IV.	STATEMENT OF THE CASE	2
V.	REASONS THE PETITION SHOULD BE GRANTED	10
	A. The Ninth Circuit's Decision Is in Direct Conflict with Decisions from the Seventh, Eighth and Eleventh Circuits	10
	B. The Court Should Grant Certiorari to Clarify the Meaning of its Holding in *Mertens*	16
	C. Petitioners Properly Stated a Claim for Restitution in the Trial Court	20

Page

D. The Panel Opinion in This Case Leaves The Petitioners Utterly Without Remedies to Enforce Written Agreements With Their Participants 26

VI. CONCLUSION 29

APPENDIX A
Opinion, Ninth Circuit Court of Appeals, Filed December 9, 1999 ..... A-1

APPENDIX B
Memorandum and Order, U.S. District Court, Eastern District of California, Filed June 2, 1998 ..... B-1

APPENDIX C
Statutory Provisions Involved: 29 U.S.C. Section 1132(a)(3) and 29 U.S.C. Section 1144(a) C-1

TABLE OF AUTHORITIES

Page

CASES

Administrative Committee v. Gauf,
188 F.3d 767 (7th Cir. 1999) 11-14, 19

Harris Trust & Savings Bank v. Provident Life & Accident Insurance Co.,
57 F.3d 608 (7th Cir. 1995) 13

Albermarle Paper Co. v. Moody,
422 U.S. 405, 95 S. Ct. 2362 (1975) 18

Bast v. Prudential Insurance Co. of America,
150 F.3d 1003 (9th Cir. 1998) 16

Blue Cross and Blue Shield of Alabama v. Sanders,
138 F.3d 1347 (11th Cir. 1998) 11, 13-14, 19

Boggs v. Boggs,
520 U.S. 833 (1997) 27

California Division of Labor Standards v. Dillingham,
519 U.S. 316 (1997) 27

Page

Central States, Southeast and Southwest Areas Health & Welfare Fund v. Neurobehavioral Associates,
53 F.3d 172 (7th Cir. 1995) 13

Chitkin v. Lincoln National Insurance Co.,
15 F.3d 1083 (9th Cir. 1994) 11, 16

Chitkin v. Lincoln National Insurance Company,
879 F. Supp. 841 (S.D. Cal. 1995) 11, 16

A. Copeland Enterprises v. Slidell Memorial Hospital,
657 S.2d 1293 (La. 1995) 28

FMC Medical Plan v. Owens,
122 F.3d 1258 (9th Cir. 1997) 8-14, 16, 18-20, 22, 26

Farr v. U.S. West Communications, Inc.,
151 F.3d 908 (9th Cir. 1998), amended by *Farr v. U.S. West Communications, Inc.*,
179 F.3d 1252 (9th Cir. 1999), cert. denied,
____ U.S. ____, 68 U.S.L.W. 3291
(Jan. 18, 2000) 11, 16, 27

Funk Manufacturing Co. v. Franklin,
927 P.2d 944 (Kansas 1996) 28

Page

Geweke Ford v. St. Joseph's Omni Pref. Care,
130 F.3d 1355 (9th Cir. 1997) 27

Harris Trust & Savings v. Provident Life & Acc. Insurance Co.,
57 F.3d 608 (1995) 22, 26

Health Cost Control v. Isbell,
139 F.3d 1070 (6th Cir. 1997) 15

Jefferson Pilot Life Insurance Co. v. Krafka,
50 Cal. App. 4th 1990 (1996) 27

LeBlanc v. Cahill,
153 F.3d 134 (4th Cir. 1998) 15

McLeod v. Oregon Lithoprint, Inc.,
46 F.3d 956 (9th Cir. 1995), on remand,
102 F.3d 367 (1996) 16

Mertens v. Hewitt Associates,
508 U.S. 248, 113 S. Ct. 2063 (1993) 8, 13, 15-20

Nieto v. Ecker,
845 F.2d 868 (9th Cir. 1988) 27

Pacificare v. Martin,
34 F.3d 834 (9th Cir. 1994) 7

Page

Roush v. KFC National Management Co.,
10 F.3d at 392, cert. denied, ____ U.S. ____,
115 S. Ct. 56 (1995) 18

Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, et al.,
____ F.3d ____ (U.S.C.A. No. 98-15298,
January 12, 2000) 27

Schwartz v. Gregori,
45 F.3d 1017 (6th Cir. 1995) 18

Southern Council of Industrial Workers v. Ford,
83 F.3d 966 (8th Cir. 1996) 11, 14-15

In re Unisys Corp. Retiree Medical Benefit ERISA Litigation,
57 F.3d 1255 (3rd Cir. 1995) 14

United McGill Corp. v. Stinnett,
154 F.3d 168 (4th Cir. 1998) 15

Walker v. Rose,
22 F.Supp.2d 343 (D. N.J. 1998) 15

Walker v. Wal-Mart Stores, Inc.,
159 F.3d 938 (5th Cir. 1998) 15

Page

Waller v. Blue Cross of California,
32 F.3d 1337 (9th Cir. 1994) 16

Waller v. Hormel Foods,
950 F. Supp. 941 (D. Minn. 1996) 28

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

29 U.S.C. §1132(a)(3) 2, 22-23

29 U.S.C. § 1132(a)(3)(B) 14

29 U.S.C. § 1144(a) 2

42 U.S.C. § 2000e-5(g) 18

Page

PUBLICATIONS

Haycock, "The Scope and Significance of Restitution," 67 Tex. L. Rev. 1277 (1989) 22

Lawrence and Russell, "Substantive and Procedural Considerations in Initiating a Recoupment Action Under ERISA Section 502(a)(3)," 34 Tort & Insurance Law Journal, 970 (1999) 13

Restatement, Restitution (ALI, 1937) 21

PETITION FOR WRIT OF CERTIORARI

Petitioners Cement Masons Health and Welfare Trust Fund For Northern California and Board of Trustees of Cement Masons Health and Welfare Trust Fund For Northern California respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1999.

I.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (Appendix A herein) is reported at 197 F.3d 1003. The Memorandum and Order of the U.S. District Court for the Eastern District of California (Appendix B herein) filed June 2, 1998, is not reported.

II.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1). The opinion of the U.S. Court of Appeals for the Ninth Circuit was filed on December 9, 1999; this Petition is timely filed with this Court under the provisions of 28 U.S.C. Section 2101(c).

III.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this action are Section 514(a) and Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1144(a) and 1132(a)(3). The statutory provisions are set forth in Appendix C.

IV.

STATEMENT OF THE CASE

This action was brought by the Cement Masons Health and Welfare Trust Fund For Northern California ("CMHWT") and the Board of Trustees of the Cement Masons Health and Welfare Trust Fund For Northern California ("Trustees") to recover funds advanced to defray medical expenses incurred by Kimberly Stone, a now-deceased CMHWT participant; the CMHWT paid $572,325.80 in medical expenses on Ms. Stone's behalf. The suit sought restitution of funds advanced pursuant to a written reimbursement agreement and pursuant to the terms of the CMHWT plan itself, from funds recovered by Kimberly Stone's surviving spouse, Raymond Stone ("Stone"), and the Stones' dependent children. The terms of the CMHWT plan and the reimbursement agreement do not require the mere payment of money, but also require Stone, and his dependents, to take specific steps to attempt to recover medical expenses from third parties responsible for Kimberly Stone's injuries, and to keep the plaintiffs advised of such efforts. (See discussion, *infra*)

The CMHWT is an employee benefit trust fund established pursuant to a declaration of trust executed by employer associations representing employers in the unionized construction industry and union representatives of the District Council of Plasterers and Cement Masons of Northern California. Pursuant to the provisions of the declaration of trust, the CMHWT is governed by a Board of Trustees consisting of an equal number of employer and union representatives. The CMHWT trustees are empowered to promulgate, and have promulgated, a health and welfare plan for the benefit of covered participants and their eligible dependents. The plan provides, *inter alia*, medical, hospitalization and other benefits to covered participants and their eligible dependents. The parties agree that the CMHWT is an ERISA-regulated entity.

The CMHWT plan requires restitution and reimbursement of monies when a participant or eligible dependent makes a recovery from a third party source. Article IX, Section 9 of the CMHW Plan provides:

> "If an eligible individual has an ... illness, injury or condition ... for which a third party may be liable or legally responsible ... the Fund *shall have an automatic* lien upon any recovery against the third party for benefits paid by the Fund ... and such Eligible Individual *and his Dependents* ... as a condition precedent to the entitlement

> to benefits *shall agree in writing* to reimburse the Fund for any payments made by the Fund ... such reimbursement to be made out of any proceeds received by way of judgment, settlement or otherwise in connection with or arising out of any claim for or right to damages by such Eligible Individual against the third party, his insurance carrier ... or any other source of third party recovery. ... The agreement shall require *the Eligible Individual and his Dependents*, if any, *to prosecute such claim for damages diligently; to give priority to the reimbursement of the Fund in the allocation of the proceeds of any recovery; to cooperate and assist the Fund in obtaining reimbursement for such payments; to execute any documents necessary to secure such reimbursement; and to refrain from any act or omission which might hinder such reimbursement. ...*" [Emphasis supplied]

Raymond Stone, decedent Kimberly Stone's husband, is a CMHWT participant. Raymond Stone executed a reimbursement agreement on January 17, 1996, which recites, in pertinent part:

> "The undersigned Participant has submitted to the Cement Masons Health and Welfare Trust Fund for Northern California, a claim for benefits

in connection with an illness, injury, disease or other condition for which a third party may be liable or legally responsible by reason of an act or omission of such third party. Therefore, pursuant to Section 9 of Article IX of the Fund's Health and Welfare Plan and as a condition precedent to his entitlement to benefits from the Fund, the undersigned agrees to reimburse the Fund for any payments made by the Fund on account of hospital, medical or other expenses in connection with, or arising out of, any such injury, illness, disease or other condition, such reimbursement to be made out of any proceeds received by way of judgement, arbitration award, settlement or otherwise in connection with, or arising out of, any claim for or right to damages *by the undersigned or his Dependent* against such third party, his insurance carrier, guarantor or other indemnitor, or by reason of uninsured or under-insured motorist coverage of *the undersigned or his Dependent*, or any other source of third party recovery.

"The undersigned hereby further agrees that *the undersigned and his Dependent*, if any, *will prosecute such claim for damages diligently; will cooperate and assist the Fund in*

> *obtaining reimbursement for such payments; will give priority to the reimbursement of the Fund in the allocation of the proceeds of any recovery; will execute any documents necessary to confirm or establish a lien in favor of the Fund on any such claim, action or recovery of damages or to otherwise secure such reimbursement;* and will refrain from any act or omission that might prejudice or hinder such reimbursement." [Emphasis supplied]

The CMHWT's complaint alleged that defendant Raymond Stone and his dependents "have pursued and are pursuing claims against the party or parties who caused the accident in which Kimberly Stone sustained injuries, and the allegedly negligent health care provider" and further alleged that Stone "(1) has failed to acknowledge the right of plaintiffs to assert their lien for reimbursement against sums recovered or to be recovered from third parties; (2) has failed to advise plaintiffs of the status of his claims against the third party; and (3) has, on information and belief, taken steps to insulate the recovery of defendant and his dependents from the lien of plaintiffs." Plaintiffs further alleged that defendant Stone's conduct "violates the terms of the CMHWT plan" and "violates the terms of the reimbursement

agreement."[1] The Complaint alleged that the trustees "have no legal remedy at law, and therefore request a declaratory judgment and an injunctive order finding and requiring defendant to (1) acknowledge the lien of the CMHWT on any proceeds recovered from third parties up to and including $572,325.80, plus interest thereon; (2) requiring defendant to fully advise plaintiffs of the nature and status of all claims against third parties for recovery of expenses and/or damages in connection with the injuries and death of Kimberly Stone; and (3) to refrain from obstructing plaintiffs' right to enforce their lien against any proceeds recovered by defendant and his dependents from third parties."

Stone answered the Complaint; in his answer "defendant Stone [admitted] that he and his dependents have pursued and are pursuing claims against the parties who caused the accident in which Kimberly Stone sustained injuries, and the negligent health care providers, [but] defendant Stone does not acknowledge the plaintiffs' right to assert their lien for reimbursement against sums recovered from third parties." Stone's answer alleged as an affirmative defense that "Plaintiff is not entitled to seek recovery on its alleged lien and is barred from the recovery currently sought pursuant to *Pacificare v. Martin*, 34

---

[1]Stone's successful motion for summary judgment, described below, was predicated on the assumption that there are no material facts in dispute; "he chose to accept as true all of plaintiffs' allegations in the complaint." *Stone*, 197 F.3d at 1008.

F.3d 834 (9th Cir. 1994)." Stone filed a motion for summary judgment on April 15, 1998 which was heard and orally granted on May 29, 1998.

The trial court's brief Memorandum and Order, filed June 2, 1998, states: "Stone argues that plaintiffs' suit seeks reimbursement, not restitution within the meaning of § 1132(a)(3), and that the court lacks subject matter jurisdiction over plaintiff's claim for reimbursement. The court agrees. Stone's motion for summary judgment is granted." (Memorandum and Order, p. 2, ll. 5-7)

The sole basis for the trial court's ruling was the decision of the Ninth Circuit in *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997), which held that this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063 (1993), foreclosed any action under Section 1132(a)(3) of ERISA for "monetary relief." (Memorandum and Order, p. 2)

The U.S. Court of Appeals for the Ninth Circuit affirmed in pertinent part, finding that *FMC Medical Plan, supra*, is "legally indistinguishable" from the present case and compels dismissal.[2] 197 F.3d at 1006. The panel reversed the trial court on one point. The trial court had dismissed the action for lack of jurisdiction. The panel held that jurisdiction existed, but that ERISA provided no remedy. Therefore, the

---

[2]Although *Owens* is contrary to holdings in other circuits, the plaintiff medical plan in *Owens* did not petition this court for a writ of certiorari.

panel ruled dismissal should have been on the merits. 197 F.3d at 1007-08. The panel remanded to the U.S. District Court with instructions to dismiss the case on the merits.[3] 197 F.3d at 1008.

In affirming the trial court, the circuit panel rejected the argument that a claim of restitution would lie against Raymond Stone; the panel held that an action in restitution is only appropriate where the claimant is seeking to recapture "ill-gotten gains." 197 F.3d at 1006-07, citing *Owens*, 122 F.3d at 1261. The panel stated that "we have construed ill-gotten gains to mean money obtained through 'fraud or wrongdoing ...'" and found that Stone's refusal to honor his reimbursement agreement and plan reimbursement requirements did not cause his "gain" of over half a million dollars to be "ill-gotten." 197 F.3d at 1007.

The panel also ruled that the fiduciaries' claims for declaratory and injunctive relief were not tenable because they were merely a mechanism "to obtain the equivalent of a damage remedy." *Id.*

Finally, the panel ruled that the only fund at issue was $50,000 recovered by the Stones' two minor children who "have no obligation whatsoever under

---

[3]Although the panel held itself bound to follow *Owens*, *Owens* dismissed the claimant's reimbursement suit for lack of subject matter jurisdiction, *not* on the merits. See *Owens*, 122 F.3d at 1261.

the plan appellants' are seeking to enforce."[4] 197 F.3d at 1007. The panel acknowledged the fiduciaries' contention that "Mr. Stone attempted to circumvent his obligation by allowing his children to exhaust the [insurance] policy limits with their claims ... [and] Mr. Stone dismissed his own claims in [a] second lawsuit to prevent the fund from sharing in any recovery resulting from the wrongful death claim."[5] 197 F.3d at 1005. But the panel failed to discuss the implications of these undisputed points in the record.

On remand, the trial court dismissed the case on the merits.

Petitioners timely filed the within petition.

V.

REASONS THE PETITION SHOULD BE GRANTED

A. The Ninth Circuit's Decision Is in Direct Conflict with Decisions from the Seventh, Eighth and Eleventh Circuits

As noted above, the panel opinion relies entirely on the earlier circuit decision in *FMC Medical Plan v.*

---

[4]This is an erroneous statement. Both the CMHWT Plan and the reimbursement agreement obligate "dependents" to take steps to reimburse the trust for medical costs advanced.

[5]In fact, it appears that Mr. Stone a rranged for a third party to serve as guardian ad litem for the children, precisely to avoid the terms of the plan and the reimbursement agreement.

Owens, 122 F.3d 1258, 1261-62 (9th Cir. 1997). The panel opinion fails to discuss or even acknowledge the reported cases from the Seventh, Eighth and Eleventh Circuits which reject the reasoning of *Owens*; see *Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999); *Southern Council of Industrial Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996); *Blue Cross and Blue Shield of Alabama v. Sanders*, 138 F.3d 1347 (11th Cir. 1998).[6]

---

[6]There is, in fact, an *intra-circuit* conflict on the question of whether "appropriate equitable relief" may include a specific performance action to compel reimbursement of medical expenses advanced by an ERISA-regulated trust fund. As noted above, the Ninth Circuit's published opinion in *FMC Medical Plan v. Owens, supra*, held that "equitable relief" did not permit a claim for restitution to lie against a plan participant that had signed a reimbursement agreement, because the ultimate object of the suit was to compel reimbursement of monies paid to a plan participant, which the court characterized as "monetary damages:" 122 F.3d at 1261. But the same court previously permitted a suit to compel reimbursement on an unjust enrichment theory to proceed; see *Chitkin v. Lincoln National Insurance Co.*. 15 F.3d 1083 (9th Cir. 1994) [unpublished], printed as an appendix in *Chitkin v. Lincoln National Insurance Co.*, 879 F.Supp. 841, 864 (S.D. Cal. 1995). In yet another Ninth Circuit decision, a concurring member of the panel stated flatly that "money damages are available under Section 502(a)(3) as a form of restitution ...." *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 917 (per Hawkins, C.J.), amended by *Farr v. U.S. West Communications, Inc.*, 179 F.3d 1252 (9th Cir. 1999), *cert. denied*, ____ U.S. ____, 68 USLW 3291, 3355 (Jan. 18, 2000) . Although these cases were cited in petitioners' briefs, the circuit panel failed to acknowledge or discuss any of them.

The *Gauf* decision is virtually on all fours with *Stone* and *Owens*. The Wal-Mart Associates Health & Welfare Plan ("Plan") sued Wal-Mart employee Patricia Gauf to compel reimbursement of $9,870 in benefits, pursuant to a Plan provision requiring reimbursement when employees obtain a tort recovery for damages arising out of the medical condition for which the Plan paid; 188 F.3d at 768-69. As in the present case, the Plan sued under Section 502(a)(3) of ERISA to obtain "other appropriate equitable relief ... to enforce ... the terms of the Plan." Gauf's attorneys argued that the Plan was seeking a legal remedy, because the ultimate purpose of the suit was to obtain reimbursement of money; 188 F.3d at 770. The Seventh Circuit rejected this argument stating:

> "Although the pertinent parts of the complaint employ a variety of terms to express the relief requested, we believe that a fair reading of the document in its totality makes clear that the Committee is seeking an equitable remedy against Ms. Gauf to insure her compliance with the terms of the Plan. For example, the complaint requests 'specific performance and enforcement' of the contract and an 'order enjoining defendant from continuing to violate the terms of the Plan."

Gauf acknowledged the *Owens* decision and rejected it, noting that "our Circuit consistently has held that a complaint purporting to state a claim for equitable

relief under a reimbursement clause in a benefits contract is an equitable claim for purposes of ERISA Section 502(a)(3)." 188 F.3d at 771, citing *Harris Trust & Savings Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995); *Central States, Southeast and Southwest Areas Health & Welfare Fund v. Neurobehavioral Associates*, 53 F.3d 172, 173-74 (7th Cir. 1995).

Blue Cross and Blue Shield of Alabama v. Sanders, 138 F.3d 1347 (11th Cir. 1998), is yet another case in which a health plan was permitted to pursue a claim for equitable relief to compel reimbursement under Section 502(a)(3) of ERISA. As in *Owens*, *Gauf* and the present case, the action arose out of plan provisions permitting the plan to obtain reimbursement in the event the participant obtained a tort recovery against a party causing the injury for which benefits were paid. As in *Gauf* and the present action, the defendants relied on *Owens'* assertion that a reimbursement claim is an action for legal relief unavailable under Section 502(a)(3) of ERISA. The Eleventh Circuit squarely rejected this argument stating that "*Owens* appears to be based on an unduly narrow reading of *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993).[7] ... The Court in *Mertens* did not imply

---

[7]*FMC Medical Plan v. Owens, supra*, has been the subject of some critical legal commentary; see *Lawrence and Russell*, "Substantive and Procedural Considerations in Initiating a Recoupment Action Under ERISA Section 502(a)(3),", 34 Tort & Insurance Law Journal, 970, 977 (1999).

that specific performance is unavailable under 29 U.S.C. § 1132(a)(3)(B). Because specific performance is a traditional form of equitable relief, see *Owens-Illinois, Inc. v. Lakeshore Land Co., Inc.*, 610 F.2d 1185, 1189 ... we believe that specific performance may be equitable relief available under 29 U.S.C. § 1132(a)(3)(B)." 138 F.3d at 1352-1353, n. 5. See also *In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 57 F.3d 1255, 1268-69 (3rd Cir. 1995) [equitable relief under Section 1132(a)(3)(B) includes monetary awards typically available in equity, but not compensatory or consequential damages].

The present case is legally indistinguishable from *Gauf* and *Sanders*. Only the Ninth Circuit's precedential decision in *Owens*, which appears not to have been followed by any other circuit, defeated the CMHWT's claim.

On slightly different facts, the appellate court in *Southern Council of Industrial Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996), upheld the right of a plan administrator to sue to enforce subrogation provisions and a written subrogation agreement;[8] the action, which was for specific performance, sought to compel a plan participant to reimburse the plan for

---

[8]Under the rationale of the panel opinion below and of *Owens*, it makes no practical difference whether the Plan is suing to enforce a subrogation agreement or a reimbursement agreement. In either case, the argument is that the action will ultimately result in a monetary recovery to the fund, and that such a monetary recovery is precluded by the limitation of Section 502(a)(3) of ERISA to recovery of "appropriate equitable relief."

medical expenses previously advanced, out of proceeds gained from settlement of a personal injury claim against a supermarket. Noting that the allegation "that Ford admittedly failed to reimburse is a claim that Ford failed to comply with a term of the Plan," the court found that the Plan's equitable action for unjust enrichment would lie under Section 502(a)(3) of ERISA. 83 F.3d at 969. Other courts have permitted equitable actions for restitution or other equitable relief to proceed without any extended analysis of whether the "appropriate equitable relief" rubric of Section 502(a)(3) limited such rights; see, e.g., *Health Cost Control v. Isbell*, 139 F.3d 1070 (6th Cir. 1997); *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998); *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938 (5th Cir. 1998); *United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998).[9]

This Court should grant certiorari to resolve the conflict among the circuits and provide clear guidance about the limits of "appropriate equitable relief" under Section 502(a)(3)(B) and under *Mertens*.[10]

---

[9]In *Walker v. Rose*, 22 F.Supp.2d 343 (D. N.J. 1998), the trial court permitted the plaintiff to proceed with a reimbursement claim on behalf of an ERISA-regulated plan stating that "plaintiff's amended complaint does not seek monetary damages, but instead seeks to enforce the plan's subrogation/reimbursement provision, a remedy which is restitutionary in nature ...." 22 F.Supp. at 349-50.

[10]This at least the seventh time that the Ninth Circuit has visited the question, in many different factual contexts, of what

(continued)

B. The Court Should Grant Certiorari to Clarify the Meaning of its Holding in *Mertens*

In *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063 (1993), this Court ruled that an action for compensatory damages would not lie against a non-fiduciary under Section 502(a)(3) of ERISA for its knowing participation in the breach of a fiduciary duty imposed by ERISA. The petitioners represented a class of former employees of Kaiser Steel Corporation who participated in the Kaiser Steel Retirement Plan ("Plan"); the defendant, Hewitt Associates, was the Plan's actuary at a time when Kaiser was phasing out many operations, which made existing Plan actuarial assumptions obsolete. Because Hewitt Associates did not change the

---

(fn. continued)
restrictions the phrase "appropriate equitable relief" places on the ability of a party mentioned in Section 502(a)(3) to obtain a meaningful remedy under ERISA; see *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997); *McLeod v. Oregon Lithoprint, Inc.*, 46 F.3d 956, 960 (9th Cir. 1995), *on remand* 102 F.3d 367 (1996); *Waller v. Blue Cross of California*, 32 F.3d 1337, 1339 (9th Cir. 1994); *Bast v. Prudential Insurance Co. of America*, 150 F.3d 1003 (9th Cir. 1998); *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908 (9th Cir. 1998) *amended by Farr v. U.S. West Communications, Inc.*, 179 F.3d 1252 (9th Cir. 1999), *cert. denied*, ____ U.S. ____, 68 USLW 3291, 3355 (Jan. 18, 2000); and see *Chitkin v. Lincoln National Ins. Company*, 879 F.Supp. 841, 864-67 (S.D. Cal. 1995), publishing (as an appendix) the circuit's (previously unpublished) opinion cited at 15 F.3d 1083 (1994). Only a ruling from this court will end the long dialogue about the meaning of the term "appropriate equitable relief" in Section 502(a)(3).

actuarial assumptions, Kaiser did not adequately fund the Plan, and Plan assets became insufficient to satisfy benefit obligations. 508 U.S. at 250-51. This Court found that Section 502(a)(3) would not support a claim against Hewitt, a non-fiduciary, to compel Hewitt to restore the Plan's losses, because "although we often dance around the word, what petitioners in fact seek is nothing other than compensatory damages — monetary relief for all losses their Plan sustained as a result of the alleged breach of fiduciary duties." 508 U.S. at 255.

In contrast to the present case, and the reimbursement cases discussed in Part V.A. of this petition, this Court in *Mertens* specifically noted that "no one suggests that any term of the Kaiser Plan has been violated, nor would any be enforced by the requested judgment." 508 U.S. at 253.

Moreover, this Court in *Mertens* did not bar equitable remedies which would ultimately result in a monetary recovery. The Court's opinion notes that the petitioners did not "seek a remedy traditionally viewed as 'equitable,' such as injunction or restitution." 508 U.S. at 256. Noting that "restitution" was among "those categories of relief that were typically available in equity ..." this Court went on to say "'equitable' relief must mean something less than all relief." But this Court did not say that the "less than all relief" mandated by Section 502(a)(3) of ERISA would exclude any equitable action ultimately resulting in a monetary recovery. Indeed, monetary recoveries are commonplace in restitutionary actions. See, e.g.,

Schwartz v. Gregori, 45 F.3d 1017 (6th Cir. 1995). Understandably, this Court declined to define the outer limits of "appropriate equitable relief" which could be obtained under Section 502(a)(3).

The assertion in the panel's opinion and in *Owens* that *Mertens* precludes any equitable relief which ultimately results in the payment of money goes far beyond the language of *Mertens* itself. Indeed, *Mertens explicitly analogizes* the phrase "other appropriate equitable relief" to "the similar language of Title VII of the Civil Rights Act of 1964" which includes the term "any other equitable relief the court deems appropriate ...." *Mertens*, *supra*, 508 U.S. 248, 255, 113 S.Ct. at 2068. No one would dispute that Title VII authorizes equitable relief which includes the payment of money; for example, the Supreme Court has authorized awards of both back pay and front pay (both monetary remedies) under Title VII, with no evident doubt that such payments constitute "equitable relief." See, e.g., *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975). Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), permits a court to require "reinstatement or hiring of employees *with or without back pay* [parenthetical omitted] or *any other equitable relief* as a court may deem appropriate ...." [Emphasis supplied] See also *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995) ["... the backpay awarded here constituted restitution and therefore is an equitable remedy under § 502(a)(3)." 45 F.3d at 1023]; *Roush v. KFC Nat'l. Management Co.*, 10 F.3d at 392, 398 (6th Cir. 1993), *cert. denied*, ____ U.S.

____, 115 S.Ct. 56 (1995) [front pay characterized as equitable].

It is obvious that *Mertens* does not control this case. First, as noted above, in this case there *is* an attempt to use equitable remedies to enforce provisions of an ERISA-regulated plan. Second, the plaintiffs in *Mertens* were not seeking restitution or reimbursement as here, but compensatory damages. The only question on which certiorari was granted in *Mertens* was "whether ERISA authorizes suits for money damages against non-fiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." *Mertens, supra,* 508 U.S. at 251. Nevertheless, despite the obvious distinctions between this case and the reimbursement cases, the Ninth Circuit opinions in *FMC Medical Plan v. Owens,* 122 F.3d 1258 (1997), and in this suit rely on *Mertens* as authority for the proposition that no action will lie under Section 502(a)(3) to compel compliance with the Plan's reimbursement requirements.

Owens and the Ninth Circuit panel in this case take a very different view of *Mertens* from that expressed by the Seventh Circuit in *Administrative Committee v. Gauf,* 188 F.3d 767 (1999), and by the Eleventh Circuit in *Blue Cross and Blue Shield of Alabama v. Sanders,* 138 F.3d 1347 (1998).

Petitioners believe the narrow and crabbed reading of *Mertens* in *Owens* and the present case is not justified by either the facts or the language of *Mertens.* Nevertheless, because the court below has

spoken in two published opinions about the matter, reimbursement requirements of ERISA-regulated trust funds are unenforceable nullities in the nine states in which Ninth Circuit law controls.

C. Petitioners Properly Stated a Claim for Restitution in the Trial Court

In sole reliance upon *FMC Medical Plan v. Owens*, *supra*, the Circuit panel held that petitioners' claim could not be characterized as restitutionary because "restitution is referred to in *Mertens* as the return of 'ill-gotten' assets or profits from a plan." *Stone*, 197 F.3d at 1007, citing *Mertens*, 508 U.S. at 260, 113 S.Ct. at 2071. Petitioners submit that the *Owens* and *Stone* panels read far too much into the passing reference to "ill-gotten" assets in *Mertens*. *Mertens* does not say that restitution is *limited* to actions to recover "ill-gotten plan assets or profits," it uses the phrase only to give an *example* of a claim for equitable relief. *Id.*

The panel below relied on this reasoning in *Owens*:

> "Owens did not obtain FMC's funds by any fraud or wrongdoing. Owens obtained the funds pursuant to the Plans, which obligated the funds to be paid to him under the circumstances of the case. FMC's claim is for reimbursement of money that Owens rightfully received under the Plans." 122 F.3d at 1261.

With all due respect to the panel's decision in this case and to the previous panel's decision in *Owens*,

this reasoning is simply incorrect. Assuming that Stone and Owens each received money from the Plans *with no intention whatsoever* of honoring their reimbursement agreements or Plan reimbursement requirements, their receipt and retention of Plan monies would, indeed, be "ill-gotten" gains. Moreover, the intent of Stone at the time the funds were received is a question of fact, which simply cannot be resolved on a motion for summary judgment. It is baffling that the circuit panel found it self-evident that there is no way that Owens' and Stone's receipt of funds amounting to a double recovery could be characterized as an ill-gotten gain.

There is a substantial body of academic commentary which rejects the notion that wrongdoing is a necessary element of restitution:

> "Neither wrongdoing nor title is an essential element of a restitution claim. Restitution is an alternative remedy for an ordinary breach of contract with no wrongdoing and no title involved." *Dobbs*, Law of Remedies (2nd Ed., Section 4.1(2))

Professor Dobbs' statement is consistent with the *Restatement, Restitution* (ALI, 1937) which identifies "unjust enrichment" as the touchstone for entitlement to restitutionary relief. ["A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Restatement* § 1] Comment c to Section 1 of the *Restatement* seems clearly to apply here: "Even where a person has received a benefit from another

he is liable to pay therefore only *if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.*" [Emphasis supplied] Contemporary commentary is in accord: "Defendant may be unjustly enriched without having committed any other civil wrong." Haycock, "The Scope and Significance of Restitution," 67 Tex.L. Rev. 1277, 1284 (1989).

A far more complete statement and analysis of the law of restitution than is provided by *Owens* or the panel below is set forth in the Seventh Circuit's opinion in *Harris Trust & Savings v. Provident Life & Acc. Ins. Co.*, 57 F.3d 608, 615 (1995), a decision neither discussed nor acknowledged in *Owens* or in the panel opinion. *Provident Life* upheld the enforcement of a reimbursement agreement strikingly similar to that at issue in this case, and found that a cause of action for restitution would lie to compel enforcement; the court also held that a claim for unjust enrichment would lie, stating as follows:

> "Campbell sought to recover the amounts which had been advanced on Sandra's behalf on two theories. In Count I of its counterclaim, Campbell sought equitable relief in the form of restitution to enforce the third party exclusion and its reimbursement provision under 29 U.S.C. § 1132(a)(3). Alternatively, Court II purported to state an independent cause of action under the federal common law of unjust

enrichment which was recognized in *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir.), *cert. denied*, 498 U.S. 982, 111 S.Ct. 512, 112 L.Ed.2d 524 (1990). The district court appears to have proceeded under the second theory, holding that 'although ERISA did not provide a cause of action for an insurer to recover advances, reimbursement was necessary to prevent unjust enrichment.' *Harris Trust & Savings v. Provident Life and Acc. Ins. Co.*, 854 F.Supp. 524, 533 (N.D. Ill. 1994). We need not decide which of the two theories is applicable in the present case, however, for they are interrelated and *Campbell would prevail under either.*

> "29 U.S.C. §1132(a)(3) expressly provides that: A civil action may be brought --
>
> (3) by a participant, beneficiary, or *fiduciary* (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain *other appropriate relief* (i) to redress such violations or (ii) to enforce any

> provisions of this subchapter or the terms of the plan.

"Campbell has clearly stated a viable claim for relief under § 1132(a)(3)(B). It is a fiduciary within the meaning of ERISA; the Plan specifically provides for repayment of benefits advanced under the third party exclusion; Campbell's action was initiated to enforce the repayment provision; and Campbell sought 'appropriate equitable relief' in the form of restitution. See *Mertens v. Hewitt Assoc.*, ____ U.S. ____, ____, 113 S.Ct. 2063, 2069, 124 L.Ed.2d 161 (1993) ('appropriate equitable relief' under § 1132(a)(3) includes 'categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)'); *Health Cost Controls v. Skinner*, 44 F.3d 535, 538 n. 4, 5, and 7 (7th Cir. 1995) ('although [plan administrator] clearly cannot recover compensatory damages under [§ 1132(a)(3)], if it successfully makes out a claim for restitution ... it may be entitled to monetary relief'); *UIU Severance Pay Trust Fund v. Local Union No. 18-U*, 998 F.2d 509, 512-13

(7th Cir. 1993) (ERISA permits claim for restitution).

"Restitution is available, however, 'only when one party has been enriched at another's expense.' *Skinner*, 44 F.3d at 538 n. 7. To establish entitlement to the relief it seeks, Campbell must, therefore, demonstrate that:

> (1) [it] had a reasonable expectation of payment, (2) the [plaintiffs] should reasonably have expected to pay, or (3) society's reasonable expectations of person and property would be defeated by nonpayment. C. C. Kaufman, *Corbin on Contracts* § 19A, at 50 (Supp. 1989).

"*Waller*, 906 F.2d at 993-94. It has met that burden in the present case. The undisputed evidence clearly demonstrates that Campbell advanced benefits under the third party exclusion provision with the expectation of being repaid; that the plaintiffs knew that the Campbell Plan contained a third party limitation when they requested and received benefits on Sandra's behalf; and that 'the interests of society, as

> reflected in the goals of ERISA and efficient plan administration, would be served by allowance of an equitable remedy.' *Waller*, 906 F.2d at 993-94." [Footnote omitted]

Petitioners submit that *Provident Life's* analysis of the elements of restitution is correct. Permitting Stone to manipulate the recovery of insurance proceeds by directing them to his children, as petitioners alleged in their complaint below, makes out a colorable case of unjust enrichment. The undisputed facts in this case support a resitutionary remedy.

D. The Panel Opinion in This Case Leaves The Petitioners Utterly Without Remedies to Enforce Written Agreements With Their Participants

The *Owens* panel evidently believed that the plaintiff health plan could obtain reimbursement by suing in state court:

> "FMC will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement it is allegedly owed by Owens." 122 F.3d at 1261.

The *Stone* opinion, however, makes it clear that the Plan may not proceed in state court. The *Stone* panel rejected the trial court's decision (which, like *Owens*, stated that the Plan could sue in state court) and remanded for dismissal *on the merits*; 197 F.3d at 1008. Because *Stone* finds that there is jurisdiction

over the claim under ERISA, but that ERISA provides no remedy, recognized principles of ERISA preemption mean that no remedy whatsoever exists; see, e.g., *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908 (9th Cir. 1998) *amended by Farr v. U.S. West Communications, Inc.*, 179 F.3d 1252 (9th Cir. 1999), *cert. denied*, ____ U.S. ____, 68 USLW 3291, 3355 (Jan. 18, 2000). See also *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988)[11]

Moreover, state courts have not hesitated to strike down, on ERISA preemption grounds, breach of contract claims brought pursuant to state law to enforce reimbursement agreements; *see*, e.g., *Jefferson Pilot Life Ins. Co. v. Krafka*, 50 Cal.App.4th

---

[11]The Ninth Circuit's most recent discussion and analysis of this Court's ERISA preemption cases is *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, et al.*, ____ F.3d ____ (U.S.C.A. No. 98-15298, January 12, 2000). Citing this Court's recent decisions in *California Division of Labor Standards v. Dillingham*, 519 U.S. 316, 355 (1997), and *Boggs v. Boggs*, 520 U.S. 833 (1997), the circuit panel acknowledged that the Ninth Circuit "has not arrived upon a single, precise rule that universally determines whether ERISA preempts a state law." After discussing a variety of factors, the panel opinion notes that "the key issue is whether the parties' relationships are ERISA-governed relationships," citing *Geweke Ford v. St. Joseph's Omni Pref. Care*, 130 F.3d 1355, 1360 (9th Cir. 1997). If the Ninth Circuit's analysis of this Court's ERISA preemption decisions is accurate, there seems to be little doubt that ERISA would completely preempt a state law breach of contract claim to compel reimbursement of medical costs advanced by an ERISA-regulated plan. Certainly, the relationship between Plan fiduciaries and participants would fall among the category "ERISA-governed relationships."

1990, 1994 (1996); *A. Copeland Enterprises v. Slidell Memorial Hospital*, 657 S.2d 1293, 1302 (La. 1995); *Funk Manufacturing Co. v. Franklin*, 927 P.2d 944 (Kansas 1996).

Of course, there is nothing whatsoever in the legislative history of ERISA to indicate that Congress intended the enactment of ERISA to completely abrogate a mechanism by which ERISA-regulated plans could lower costs for all participants, by compelling participants to pursue third party wrongdoers for damages, and to contribute the proceeds to the plan to reimburse previously advanced medical and hospital costs.

There is little doubt that reimbursement and subrogation provisions are central to the operation of health plans:

> "Subrogation clauses are a common feature of ERISA plans. While they vary widely in precise operation and effect, they share the goal of limiting the total expenditure of plan assets. Subrogation accomplishes this by permitting the plan to 'stand in the shoes' of the beneficiary with respect to tort or other recoveries to which the beneficiary is entitled on account of the injuries for which the plan has paid benefits. This prevents the beneficiary from recovering twice — once from the plan and once from the tortfeasor .... Subrogation is frequently confused with reimbursement, owing perhaps to the

> frequency with which both provisions are included in ERISA plans." *Waller v. Hormel Foods*, 950 F.Supp. 941, 944 (D. Minn. 1996).

It is utterly inexplicable that the Circuit panel would act to strip ERISA-regulated benefit plans of any remedy whatsoever, simply because enforcement of such agreements would ultimately result in a monetary recovery by the plan. Yet it is clear that that is exactly what the *Stone* panel intended to do.

VI.
CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be granted.

Dated: February 11, 2000

Respectfully submitted,

STANTON, KAY & WATSON, LLP

By: JAMES P. WATSON
Counsel of Record for Petitioners

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA; BOARD OF TRUSTEES OF CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA,
Plaintiffs-Appellants,

v.

RAYMOND STONE,
Defendant-Appellee.

No. 98-16150

D.C. No. CV-97-00931-FCD/PAN

OPINION

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, Jr., District Judge, Presiding

Argued and Submitted
June 17, 1999—San Francisco, California

Filed December 9, 1999

Before: David R. Thompson and William A. Fletcher, Circuit Judges, and Susan Oki Mollway,[1] District Judge.

Opinion by Judge William A. Fletcher

---

[1]Honorable Susan Oki Mollway, United States District Judge for the District of Hawaii, sitting by designation.

COUNSEL

James P. Watson, Stanton, Kay & Watson, San Francisco, California, for plaintiffs-appellants Cement Masons Health & Welfare Trust Fund for Northern California, et al.

Daniel E. Wilcoxen and Steven H. Schultz, Wilcoxen, Montgomery & Harbison, Sacramento, California, for defendant-appellee Raymond Stone.

OPINION

W. FLETCHER, Circuit Judge:

On December 19, 1995, Kimberly Stone was trying to rescue an injured dog when she was struck and severely injured

by a passing car. On January 29, 1996, Ms. Stone was recovering from surgery at Chico Community Rehabilitation Hospital when a feeding tube in her abdomen was accidentally dislodged. Hospital staff allegedly reinserted the tube incorrectly, causing a massive infection that resulted in Ms. Stone's death the next day.

Appellant Cement Masons Health and Welfare Trust Fund (Cement Masons) paid $572,325.80 for Ms. Stone's medical expenses from the time of the accident until she died. On the day of her death, Raymond Stone, Ms. Stone's husband and defendant in this action, signed a reimbursement agreement with Cement Masons according to the terms of the Rules and Regulations for the Fund. The agreement required Stone to pursue diligently any claims for medical payments for his wife's injuries against a third party and to reimburse the Fund if he were to recover from such a third party.[2]

---

[2]The relevant language of the agreement states:

> . . . [T]he undersigned agrees to reimburse the Fund for any payments made by the Fund on account of hospital, medical, or other expenses in connection with, or arising out of, any injury [for which a third party may be liable or legally responsible] . . . , such reimbursement to be made out of any proceeds received by way of judgment, arbitration award, settlement or otherwise in connection with, or arising out of, any claim for or right to damages by the undersigned or his Dependent against such third party, his insurance carrier, guarantor, or other indemnitor, or by reason of uninsured or under-insured motorist coverage of the undersigned or his Dependent, or any other source of third party recovery.
>
> The undersigned hereby further agrees that the undersigned and his Dependent, if any, will prosecute such claim for damages diligently; will cooperate and assist the Fund in obtaining reimbursement for such payments; will give priority to the reimbursement of the Fund in the allocation of the proceeds of any recovery; will execute any documents necessary to confirm or establish a lien in favor of the Fund on any such claim, action or recovery or damages or to otherwise secure such reimbursement . . . .

On December 18, 1996, Ms. Stone's two minor children, Matthew and Haven Stone, sued the driver of the car through their guardian ad litem, Mary Kay Carlton,[3] seeking damages for negligent infliction of emotional distress. Matthew and Haven settled the suit for $50,000, the coverage limit under the driver's insurance policy.

On January 28, 1997, Raymond Stone, and Matthew and Haven Stone (again through their guardian ad litem), sued the driver of the car; a possible owner of the car; the City of Sacramento; Chico Community Hospital; Chico Community Rehabilitation Hospital; and various hospital staff members. The suit included a wrongful death claim against the driver and possible owner of the car, but the most significant claims were based on the alleged negligence in reinserting the feeding tube. On January 21, 1998, Mr. Stone dismissed all of his claims against the defendants, leaving only Matthew and Haven as plaintiffs in that action.

When Mr. Stone failed to reimburse the Fund out of the $50,000 awarded to his children in the first suit, appellants Cement Masons and its Board of Trustees sued him for restitution under the terms of the reimbursement agreement of the plan and under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a)(3). Appellants argued that Mr. Stone was obligated by the Plan to give priority to claims to recover the medical expenses paid for Ms. Stone's hospitalization and surgeries. According to appellants, Mr. Stone attempted to circumvent his obligation by allowing his children to exhaust the driver's policy limits with their claims for negligent infliction of emotional distress. Appellants contended, further, that Mr. Stone dismissed his own claims in the second lawsuit to prevent the Fund from sharing in any recovery resulting from the wrongful death claim.

[3]The district court, relying on counsel's statements at oral argument, erroneously concluded that Mr. Stone was the guardian ad litem for the two children in the two state court actions. The complaints (provided in the record) list Mary Kay Carlton as the guardian ad litem.

Appellants sought restitution, declaratory relief, and an injunction requiring Mr. Stone (1) to acknowledge the Fund's lien against proceeds recovered from third parties; (2) to advise the Fund of the nature and status of all claims against third parties for damages in connection with Ms. Stone's injuries and death; and (3) to refrain from obstructing the Fund's right to enforce the lien against proceeds recovered by Matthew and Haven Stone.

The district court granted Mr. Stone's motion for summary judgment and dismissed for lack of subject matter jurisdiction. Interpretation of ERISA is a question of law reviewed *de novo*. *See Spink v. Lockheed Corp.*, 125 F.3d 1257, 1260 (9th Cir. 1997). A decision granting summary judgment is reviewed *de novo*. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). Dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *See Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998).

For the reasons that follow, we agree with the district court that appellants' complaint should be dismissed. That dismissal, however, should have been made on the merits rather than for want of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

1. *The Merits of Appellants' Claim*

[1] Injunctive and "other appropriate equitable relief" is available under ERISA, 28 U.S.C. § 1132(a)(3).[4] Such relief includes restitution, *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), but it does not include contract damages, *id.*, or reimbursement pursuant to contract, *FMC Med. Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997).

[4]"A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . ."

We believe that this case is controlled by our decision two years ago in *Owens*, in which we held that reimbursement for payments appropriately made by a plan is not an available remedy under § 1132(a)(3). Applying the Supreme Court's decision in *Mertens*, we held in *Owens* that because the phrase "other appropriate equitable relief" did not encompass FMC's reimbursement claim, ERISA provided no remedy.[5] *See id.* at 1260-1262.

The facts in *Owens* are legally indistinguishable from the facts in this case. The FMC Medical Plan (FMC Plan) in that case provided that if the participant were to bring a liability claim against a third party, the participant must assert a claim for benefits payable under the Plan. *See id.* at 1259. The FMC Plan also provided that upon settlement of a third-party claim, the participant "must reimburse the FMC Plan for the benefits provided." *Id.* The FMC Plan required the participant to sign a reimbursement form in order to receive benefits on any claim with a possibility of third-party liability. *See id.* Owens signed the reimbursement form, which provided:

> I agree for myself and dependent(s), to reimburse FMC Corporation for any amounts paid by the plan and recovered from another person or company. If I bring a claim against any party, benefits payable under this Plan must be included in the claim, and when the claim is settled I must reimburse the Plan for benefits provided.

Id. Owens settled his liability claim against the party responsible for the car accident that had caused the injuries for which the medical expenses were incurred, and FMC sued to enforce the terms of the FMC Plan under § 1132(a)(3). *See id.* We

[5]Distinguishing cases involving ERISA plans that granted the insurer rights of subrogation, the court concluded that FMC's claim was for "contractual reimbursement." *Id.* Like *Owens*, this case does not involve subrogation.

held that FMC's claim was for "contractual reimbursement," a remedy that was not available under § 1132(a)(3). *Id.* at 1260.

[2] As in *Owens*, the Rules and Regulations of the Fund in this case require Mr. Stone to reimburse the Fund for medical payments arising out of claims against third parties. The Fund Rules also require Mr. Stone to give priority to reimbursement of the Fund in allocating payments and to refrain from any acts or omissions that might hinder reimbursement. We believe that the district court properly concluded under *Owens* that appellants are not entitled under § 1132(a)(3) to the remedies they seek. Indeed, appellants appeared to concede as much at oral argument before the district court and before us, where they asserted that *Owens* was wrongly decided.[6]

[3] Appellants also make two arguments why *Mertens* and *Owens* do not control this case. Appellants first contend that they seek "restitution," which they characterize as an equitable remedy. However, restitution, as used in § 1132(a)(3), means "ill-gotten gains," *Mertens*, 508 U.S. at 260, and we have construed ill-gotten gains to mean money obtained through "fraud or wrongdoing," *Owens*, 122 F.3d at 1261. It is undisputed in this case that payment of Ms. Stone's medical bills by appellants was not obtained through fraud or wrongdoing. Cement Masons was required under the terms of the Plan to make those payments, and Cement Masons is not

[6]See, e.g., the following colloquy in the district court:

THE COURT: . . . Tell me how *FMC* [*Owens*] doesn't apply to the facts here.

MS. OLSON: To be perfectly honest, I think *FMC* is — has misinterpreted the *Mertens v. Hewitt* and *McLeod v. Oregon Lithoprint* . . . .

THE COURT: The issue is what am I obliged to do, and I'm just asking you point blank: Are you asking me to ignore *FMC*?

MS. OLSON: I guess so.

challenging their correctness. Rather, appellants contend that Mr. Stone is obliged to reimburse Cement Masons for those payments out of money obtained from third parties, and to pursue claims that might result in obtaining additional money from third parties in the future. Even if Mr. Stone has some obligation to pursue such claims and to reimburse Cement Masons (a question we do not decide), that obligation does not make money previously paid by Cement Masons "ill-gotten gains" subject to restitution within the meaning of § 1132(a)(3).

Appellants next contend that they are entitled to declaratory and injunctive relief requiring Mr. Stone (1) to acknowledge the Fund's lien against funds against third parties; (2) to refrain from obstructing Cement Masons' right to enforce the lien against proceeds recovered by defendant and his dependants from third parties; and (3) to advise Cement Masons of the nature and status of all claims against third parties for damages in connection with Ms. Stone's injuries and death. Appellants attempt to distinguish *Owens* by arguing that such injunctive and declaratory relief, unlike reimbursement, is permissible under § 1132(a)(3).

[4] Unlike the plan in *Owens*, the Cement Masons Fund Rules and Regulations purport to establish an automatic lien on any third-party recovery for benefits paid by the Fund. We do not find that difference material. Two of the three remedies appellants seek depend on the propriety of enforcing the lien. Enforcement of a lien, however, is nothing more than a mechanism to enforce, or to obtain the equivalent of, a damage remedy. Further, on the facts of this case, the only existing fund is the $50,000 received by the two minor children, who have not been made defendants and, in any event, have no obligation whatsoever under the Plan appellants are seeking to enforce. The third remedy appellants seek is an injunction that would require Mr. Stone to keep them informed of claims against third parties. However, it is undisputed that Mr. Stone

has not recovered on third-party claims and is not asserting any new third-party claims.

2. *Dismissal on the Merits*

[5] The district court correctly applied the substantive holding in *Owens* but erred in dismissing for lack of subject matter jurisdiction. The court's error results from some confusion in our case law concerning the appropriate disposition of unsuccessful claims brought under ERISA. In *Owens*, we held that the district court lacked subject matter jurisdiction under ERISA because the Plan's claim was "not cognizable under section 1132(a)(3)." In other cases we have dismissed claims on the merits where § 1132(a)(3) provides no remedy. For example, in *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376 (9th Cir. 1996), we affirmed summary judgment on the merits for the defendant, holding that the relief plaintiff sought was not available under § 1132(a)(3). *See also Farr v. U.S. West Communications, Inc.*, 151 F.3d 908 (9th Cir. 1998), amended by 179 F.3d 1252 (9th Cir. 1999), *petition for cert. filed*, 68 USLW 3291 (U.S. Oct. 7, 1999) (No. 99-664) (holding that fiduciary had breached duty under ERISA but affirming summary judgment on the merits for defendant because relief was not available under § 1132(a)(3)); *Pacificare, Inc. v. Martin*, 34 F.3d 834, 835, 838 (9th Cir. 1993) (framing issue in terms of whether plaintiff could state a claim under § 1132(a)(3), not whether there was subject matter jurisdiction). At least two other circuits have concluded that the unavailability of an equitable remedy does not mean that the district court is without subject matter jurisdiction, but, rather, means that the plaintiff has failed to state a claim upon which relief can be granted. *See Blue Cross and Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1352-53 (11th Cir. 1998); *Health Cost Controls v. Skinner*, 44 F.3d 535, 537 (7th Cir. 1995).

[6] We hold that a dismissal of an ERISA claim under § 1132(a)(3) is properly a dismissal on the merits rather than a dismissal for want of subject matter jurisdiction. The failure

to state a federal claim, either on the pleadings or the facts, is not the same thing as a failure to establish subject matter jurisdiction. Any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits. As the Supreme Court wrote in *Bell v. Hood*, 327 U.S. 678, 682 (1946),

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover . . . . If the court . . . exercise[s] its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be based on the merits, not for want of jurisdiction.

See also Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963) ("We agree . . . that on the face of the complaint the federal court had jurisdiction . . . . But on the undisputed facts, . . . no federal cause of action can be made out.").

[7] In this case, the district court granted summary judgment against Cement Masons. Such a disposition was arguably appropriate, given that defendant had moved for summary judgment rather than for a dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. We note, however, that defendant more properly should have moved for a dismissal under Rule 12(b)(6), given that he chose to accept as true all of plaintiffs' allegations in the complaint. In either event—whether the dismissal resulted from a summary judgment, or from the granting of a motion under Rule 12(b)(6)—the district court should have dismissed on the merits. Plaintiffs' claim, while unsuccessful and possibly verging on foolhardy given our earlier decision in *Owens*, was not frivolous. A federal court has subject matter to decide a non-frivolous federal claim against a plaintiff, and a decision dismissing the claim is a decision on the merits of that claim.

We therefore AFFIRM the district court's decision dismissing appellants' claim and REMAND for entry of judgment on the merits.

APPENDIX B

FILED
JUN 02 1998
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA and BOARD OF TRUSTEES OF CEMENT MASONS HEALTH AND WELFARE TRUST FUND OF NORTHERN, CALIFORNIA,

Plaintiffs,

v.

RAYMOND STONE,

Defendant.

----oo0oo----

NO. CIV. S-97-931 FCD PAN

MEMORANDUM AND ORDER

In this lawsuit, Cement Masons Health and Welfare Trust Fund of Northern California and its Board of Trustees ("plaintiffs") seek declaratory judgment and injunctive relief requiring defendant Raymond Stone ("Stone") to acknowledge plaintiffs' lien for reimbursement of medical expenses paid on behalf of Stone's deceased wife. Characterizing their suit as a claim for restitution, plaintiffs assert their right to reimbursement under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3). Stone argues that plaintiffs' suit seeks reimbursement, not restitution within the meaning of § 1132(a)(3), and that the court lacks subject matter jurisdiction over plaintiff's claim for reimbursement. The court agrees. Stone's motion for summary judgment is granted.[1]

BACKGROUND

Stone is a cement mason eligible for benefits under the employee benefit trust fund administered by plaintiffs. On December 19, 1995, defendant's wife, Kimberly Stone, was injured in an automobile accident. The minor children, Matthew and Haven Stone, witnessed the accident.

Following the accident, Kimberly was hospitalized at UC Davis Medical Center where she underwent multiple surgical procedures. On January 23, 1996, Kimberly was moved to Chico Community Rehabilitation Hospital to continue her recovery. On

---

[1]Stone moves for summary judgment pursuant to rule 56 not dismissal for lack of subject matter jurisdiction pursuant to rule 12(b) (1).

January 29, Kimberly's gastrostomy tube became dislodged causing a massive infection that eventually led to cardiorespiratory arrest and her death on January 30, 1996. Pursuant to its obligations under the plan, the employee benefit trust fund paid $572,325.80 in medical expenses on Kimberly's behalf Stone signed a reimbursement agreement entitling the trust fund to reimbursement for medical expenses from any judgment or settlement proceeds arising from any claim for or right to damages by Stone "or his Dependent" against a third party.

On December 18, 1996, Matthew and Haven Stone, by and through defendant, their guardian and litem, filed a lawsuit alleging negligent infliction of emotional distress to recover for their emotional distress caused by witnessing the collision. On January 27, 1997, Matthew and Haven, by and through defendant, their guardian ad litem, filed a wrongful death action to recover for the medical negligence of the hospital and or physicians who failed to protect Kimberly from dislodging her gastrostomy tube and the inappropriate re-installation of the tube. Stone is not a plaintiff in either action.

STANDARD

Summary judgement in appropriate if the record, read in the light most favorable to the non-moving party, demonstrates no genuine issue of material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by reference to the substantive law. See

Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

Summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will beat the burden of proof at trial. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 322-23.

ANALYSIS

Section 1132(a) of Title 29 of the United States Code is the civil enforcement provision of ERISA. Section 1132(a) allows a fiduciary to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a) (3). "Other appropriate relief" includes injunctive relief and "restitution of ill-gotten plan assets and profits." Mertens v. Hewitt Assoc., 508 U.S. 248, 255, 260 (1993).

Plaintiffs' complaint is entitled "Complaint for Restitution," but plaintiff's claim is for reimbursement, and such monetary relief in not available under § 1132 (a)(3). FMC Medical Plan v. Owens, 122 F.3d 1258, 1261 (9th Cir. 1997). The Ninth Circuit has ruled that, absent an allegation that plan assets were wrongfully acquired, a claim for monetary relief is a claim for reimbursement. Id. at

1261-62. Plaintiffs do not allege that Stone wrongfully or fraudulently procured benefits on behalf of his injured wife. This court lacks subject matter jurisdiction over plaintiffs' claim, and the claim must be dismissed.[2]

CONCLUSION

Defendant's motion for summary judgment is GRANTED.

The Clerk's Office is instructed to close this file.

IT IS SO ORDERED.

DATED: May 29, 1998

/s/ Frank C. Damrell, Jr.

FRANK C. DAMRELL, JR.

UNITED STATES DISTRICT JUDGE

---

[2]As in FMC Medical Plan, plaintiffs must pursue their claims in state court. FMC Medical Plan, 122 F.3d at 1262 n.12.

APPENDIX C

29 U.S.C. Section 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), or (5) of subsection (c) of this

section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

29 U.S.C. Section 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.